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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR NOLASCO,

Defendant and Appellant.

B230973

(Los Angeles County
Super. Ct. No. LA063233)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Susan M. Speer, Judge. Affirmed in part and reversed in part.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Nolasco appeals from a judgment entered after a jury found him guilty of attempted second degree robbery. Nolasco admitted that he had a prior sustained juvenile petition for robbery. The trial court sentenced him to 11 years in prison: the upper term of three years for the attempted robbery, doubled to six years under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)),¹ plus a consecutive five-year term for a prior serious felony conviction (§ 667, subd. (a)(1)).

Nolasco contends that the trial court abused its discretion and violated his due process rights when it denied his motion to strike the juvenile prior and then imposed the upper term sentence on the attempted robbery. We disagree.

He also contends, and the People concede, that the trial court erred in imposing the five-year prior serious felony enhancement under section 667, subdivision (a)(1), because the enhancement may not be based on a juvenile adjudication. We reverse the enhancement.

BACKGROUND

Attempted robbery victim Ramon Hernandez owns a taco truck, and sells food from that truck every day in a parking lot at the intersection of Victory Boulevard and Troost Avenue in North Hollywood. On October 1, 2009, Hernandez had four employees working with him at the taco truck, including Fernando Arellano. Between 11:00 p.m. and midnight, the employees were closing down the taco truck when Nolasco and Rodrigo Ruiz² walked into the parking lot together. Nolasco approached the taco truck. Ruiz walked toward a bar located across the parking lot from the taco truck.

Hernandez recognized Nolasco. Hernandez had lived on the same street as the Nolasco family for nine years. Hernandez had seen Nolasco at the taco truck once or

¹ All statutory references are to the Penal Code.

² Rodrigo Ruiz was Nolasco's co-defendant. Like Nolasco, Ruiz was charged with the attempted robbery of Hernandez (count 1) and the attempted robbery of Arellano (count 2). The two defendants were tried together. The jury acquitted Ruiz on count 2, and could not reach a verdict as to Ruiz on count 1. The trial court declared a mistrial as to Ruiz on count 1.

twice before. Nolasco asked Hernandez if there were any tacos left. Hernandez told him all the tacos were gone. Nolasco asked if someone could give him a light for his cigarette. One of Hernandez's employees handed Nolasco a lighter. Nolasco lit the cigarette, returned the lighter and walked to the nearby corner of Victory Boulevard and Troost Avenue.

The employees continued to close down the taco truck and prepare for the next day. After they turned off the lights on the taco truck, Nolasco returned to the truck and asked, "Who has the money?" The employees looked at Hernandez because he is the person who holds the money. That night, he was holding between \$1,200 and \$1,500. Nolasco continued to ask, in a loud voice, "Who has the money?" Hernandez believed that Nolasco was carrying a firearm because Nolasco had his hand underneath his shirt at the waistband and he was moving his hand as if he had a firearm. Hernandez was afraid. Arellano also believed that Nolasco was holding a weapon under his shirt. Arellano feared that Nolasco might shoot him and the other employees. Arellano walked toward the back of the truck and threw his wallet under a parked car to avoid turning over his money to Nolasco. The other employees ran away from the truck.

Nolasco told Hernandez, "I want the money." As Nolasco was directing his attention to Hernandez, Arellano saw an opportunity to get away. He picked up his wallet and the money that had spilled out of it and ran to a gas station across the street on Victory Boulevard. Hernandez told Nolasco, "If you want the money, you'll have to take it away from me." Nolasco moved his hand underneath his shirt. Hernandez ran toward the gas station.

As Hernandez ran away from the taco truck, he started dialing 911 on his cellular telephone. As he was approaching the corner on the other side of the parking lot where the bar is located, Ruiz grabbed Hernandez and shook him. Ruiz shouted profanities at Hernandez and asked Hernandez who he was speaking to on the telephone. Hernandez lied and stated that he was talking to his brother. Hernandez broke free from Ruiz's grip and ran across the street to the gas station.

Hernandes looked back and saw Nolasco knocking over and throwing items to the ground, from both inside and outside the taco truck. Nolasco threw food items, cooking equipment, utensils, a cooler, and a table and chairs that Hernandez had set up outside the truck for his customers. Then, Hernandez saw Nolasco and Ruiz get into a car and drive away.

The police were able to locate and pull over the car based on information Hernandez provided to the 911 operator. Ruiz was in the front passenger seat and Nolasco was in the back seat.³

The jury found Nolasco guilty of the attempted second degree robbery of Hernandez (§ 211; count 1). The jury could not reach a verdict as to Nolasco on the attempted robbery of Arellano (count 2), and the trial court declared a mistrial as to Nolasco on that count. Nolasco admitted that he had a prior sustained petition for robbery in a juvenile delinquency matter, and that he had served a prior prison term, as alleged in the amended information.

After denying Nolasco's *Romero* motion,⁴ which we discuss below, the trial court sentenced Nolasco to 11 years in prison: the upper term of three years for the attempted robbery, doubled to six years under the Three Strikes Law, plus a consecutive five-year term for the prior serious felony conviction under section 667, subdivision (a)(1). Pursuant to section 1385, the court struck the prior prison term allegation under section 667.5, subdivision (b). The court also dismissed count 2 pursuant to section 1385, on the People's motion.

³ Delmi Garcia is the only witness who testified for the defense. She was in the back seat of the car with Nolasco when the police pulled the car over. She testified that Nolasco and Ruiz appeared drunk that evening, and she had seen them drinking alcohol earlier in the day. Garcia was sitting in a car parked near the taco truck, waiting for Nolasco and Ruiz to go to the bathroom and get her some tacos, at the time of the incident. She testified that she did not see anything. She stated that she was not paying attention to what Nolasco and Ruiz were doing because she was drunk. When Nolasco and Ruiz returned to the car, Nolasco told Garcia that "some drama had happened." Garcia did not ask him what he meant by that and Nolasco did not elaborate.

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

I. Imposition of Upper Term and Second Strike Sentence

Nolasco contends the trial court abused its discretion and violated his due process rights when it denied his motion to strike the juvenile prior and then imposed the upper term on the attempted robbery.

Proceedings below

The People filed a sentencing memorandum, asking the trial court to sentence Nolasco to nine years in prison: the middle term of two years on the attempted robbery, doubled to four years under the Three Strikes Law, plus a consecutive five-year term for the prior serious felony enhancement under section 667, subdivision (a)(1).

In the sentencing memorandum, the People asserted that there are several circumstances in aggravation in this case. The People argued that Nolasco's prior convictions as an adult and sustained petition in juvenile delinquency proceedings are numerous or of increasing seriousness within the meaning of California Rules of Court, rule 4.421(b)(2). In 2003, Nolasco had a sustained juvenile petition for robbery. In 2004, while he was on probation for the juvenile robbery, he was convicted of assault with a deadly weapon other than a firearm. (§ 245, subd. (a)(1).) Nolasco served a prison term for the assault with a deadly weapon, which is another circumstance in aggravation. (Cal. Rules of Court, rule 4.421(b)(3).) Nolasco was on parole in 2009 when he committed the offense in the present case. (Cal. Rules of Court, rule 4.421(b)(4).) He also violated his parole in 2007 when he possessed a deadly weapon and in 2008 when he associated with gang members.

Nolasco filed a *Romero* motion, requesting that the court dismiss his prior juvenile strike. Nolasco argued that the prior strike was remote in time, occurring in 2003 when he was 17 years old. Nolasco was nearly 25 years old at the time of the sentencing hearing. Nolasco downplayed the seriousness of the prior strike, stating that he "took some property on the 'High School Playground' from another student against the student[']s wishes." At the sentencing hearing, Nolasco's counsel argued that it would be "unfair" and "unjust" to sentence him as a second strike offender based on the facts of the

present offense and the prior juvenile strike (which he characterized as “jacking some guy on the high school grounds for lunch money”).

The trial court denied the *Romero* motion. After reviewing Nolasco’s criminal history, as summarized in the People’s sentencing memorandum and set forth above, the court made the following comments: “I got the impression from listening to the witnesses that the defendant was a bit of a neighborhood bully and terrorized local citizens. [¶] He has a pattern of continuing criminal conduct and he is a threat to the safety of the community. And for all of those reasons, the court is going to deny the *Romero* motion.”

The trial court stated its tentative decision was to sentence Nolasco to 11 years. Nolasco argued that the sentence was too long given the nature of the prior strike and the present offense (which he referred to as “an attempted robbery with a hand in his pants”). The court commented: “In the court’s opinion he should have been convicted on count [2], but the jurors hung nine to three for guilt. [¶] To me it was a righteous robbery. It was a lot of excessive destruction of property that was used, various reasons I’ll cite in my sentencing.”

The trial court stated the following reasons for sentencing Nolasco to the upper term on the attempted robbery: “The defendant has a prior record for robbery as a juvenile and a conviction for a 245(a)(1) as an adult in 2004 in which he was sentenced to state prison for four years. [¶] His record’s serious involving crimes of violence and it is increasing in severity. [¶] Defendant was on parole when this offense was committed. [¶] The defendant poses a substantial danger to the community based on his continuing criminality. [¶] The court also finds the defendant maliciously inflicted gratuitous property damage to the victim’s taco truck, which was his livelihood[,] after the attempted robbery of the victim did not succeed. [¶] Defendant simulated a gun in order to accomplish the crime by use of fear.”

Denial of *Romero* motion

In *Romero*, the California Supreme Court held that, pursuant to section 1385, a trial court may dismiss or strike an allegation that a defendant has previously suffered a

serious and/or violent felony conviction. (*Romero, supra*, 13 Cal.4th at pp. 504, 531.) In ruling on a *Romero* motion, “the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“‘[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.’ [Citation.] To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.”’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

A court’s refusal to dismiss or strike a prior conviction is reviewed for abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

In 2003, when he was 17 years old, Nolasco committed a robbery on a high school campus. In 2004, while he was on probation for the robbery, he committed an assault with a deadly weapon and was sentenced to four years in prison. He violated his parole in 2007 when he possessed a deadly weapon and again in 2008 when he associated with gang members. In 2009, while still on parole, he committed the present offense. The trial court did not abuse its discretion in declining to strike the juvenile prior. This is not an “extraordinary case” in which “the relevant factors described in [*People v. Williams, supra*, 17 Cal.4th at p. 161] manifestly support the striking of a prior conviction and no reasonable minds could differ.” (*People v. Carmony, supra*, 33 Cal.4th at p. 379.)

Nolasco points out that a court may abuse its discretion when it considers “impermissible factors in declining to dismiss.” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Nolasco asserts that the trial court considered impermissible factors and factors not supported by substantial evidence in this case. As set forth above, before denying the *Romero* motion, the trial court commented: “I got the impression from listening to the witnesses that the defendant was a bit of a neighborhood bully and terrorized local citizens.” Nolasco argues that the evidence presented at trial does not support this characterization. But even if this were an improper factor, as Nolasco contends, any error would not be prejudicial because the trial court had valid reasons for denying the *Romero* motion, as discussed above.

Upper term sentence for attempted robbery

Under section 1170, subdivision (b), a trial court has broad discretion in selecting the base term for an offense. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The statute provides, in pertinent part: “In determining the appropriate term, the court may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court’s discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” (§ 1170, subd. (b).)

“The court shall state the reasons for its sentence choice on the record at the time of sentencing.” (§ 1170, subd. (c).) As set forth above, the trial court stated numerous reasons for imposing the upper term. Nolasco does not challenge several of the aggravating factors the court listed as reasons for its sentencing choice: (1) that Nolasco’s record includes crimes of violence and convictions of increasing severity (Cal. Rules of Court, rule 4.421(b)(2)); (2) that Nolasco was on parole when he committed the present offense (Cal. Rules of Court, rule 4.421(b)(4)); and (3) that Nolasco poses a

substantial danger to the community based on his continuing criminality (Cal. Rules of Court, rule 4.421(b)(1)). “Only a single aggravating factor is required to impose the upper term.” (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Nolasco asserts that the trial court abused its discretion and violated his due process rights by relying on “so many” other “impermissible factors or factors which were not supported by testimony or other evidence.” Nolasco contends that reliance on these improper factors resulted in a sentencing decision which was “irrational and arbitrary and therefore, fundamentally unfair under the Due Process Clause of the Fourteenth Amendment.”⁵

We already addressed above the first purportedly improper factor that Nolasco lists—that Nolasco “was a bit of a neighborhood bully and terrorized local citizens.” For the reasons discussed above, this statement by the trial court did not render Nolasco’s sentencing irrational, arbitrary and fundamentally unfair.

Next, Nolasco challenges one of the court’s stated reasons for imposing the upper term—that he “maliciously inflicted gratuitous property damage to the victim’s taco truck, which was his livelihood[,] after the attempted robbery of the victim did not succeed.” He argues there is no evidence supporting this reason. We disagree. Hernandez had owned the taco truck for eight years and had about \$5,000 worth of cooking and serving equipment. Hernandez testified that he operated the taco truck every day. Immediately after the attempted robbery, Nolasco knocked over or threw to the ground food items, cooking equipment, a table, chairs, utensils and a cooler, among other items. According to Hernandez, Nolasco “threw everything” that was outside and inside

⁵ Nolasco did not object below that the factors the trial court relied on were impermissible or unsupported by the evidence. The People argue that he has forfeited these claims. (*People v. Scott* (1994) 9 Cal.4th 331, 356 [“complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal”].) We review the claims because Nolasco argues that reliance on these factors rendered his sentencing fundamentally unfair in violation of his due process rights. He argued below that the 11-year sentence was unfair and unjust under the circumstances of his case.

the truck except “the cover that [Hernandes] put on top” of the taco truck. Although Hernandez did not seek restitution, he testified that property at his taco truck was damaged.

Nolasco also challenges the court’s reliance on the fact that he simulated a gun in order to accomplish the attempted robbery by use of fear. Nolasco argues that it was impermissible for the court to rely on this fact as a reason for imposing the upper term because use of fear is an element of the crime in this case. (See Cal. Rules of Court, rule 4.420(d) [“A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term”].) We agree that this fact is an improper reason for imposing the upper term. But we disagree with Nolasco that reliance on this reason rendered the sentencing irrational, arbitrary and fundamentally unfair, given all of the other proper aggravating factors the court cited in imposing the upper term.

Finally, Nolasco complains about a comment the trial court made before it listed its reasons for sentencing Nolasco to the upper term. After the trial court stated that its tentative decision was to sentence Nolasco to 11 years, Nolasco argued that the sentence was too long given the nature of the prior strike and the present offense. The court responded: “In the court’s opinion he should have been convicted on count [2], but the jurors hung nine to three for guilt. . . .” Nolasco concedes that “[i]t is permissible [for a court] to consider the facts surrounding counts which are dismissed,” but argues that “it is not permissible to punish a defendant for exercising his right to go to trial.” As discussed above, the court stated several aggravating factors in imposing the upper term sentence. The record does not support Nolasco’s claim that the court was punishing him for rejecting a plea deal and proceeding to trial.

The trial court did not abuse its discretion or violate Nolasco’s due process rights in denying to strike his juvenile prior and in imposing the upper term on the attempted robbery conviction.

II. Imposition of Prior Serious Felony Enhancement

Nolasco contends the trial court erred in imposing the five-year prior serious felony enhancement under section 667, subdivision (a)(1), because the enhancement was improperly based on a juvenile adjudication. The People concede the error.

Section 667, subdivision (a)(1), provides in part: “[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . , shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.”

Here, the enhancement the trial court imposed was based on the 2003 sustained juvenile petition for robbery. The parties agree that a prior juvenile adjudication may not be used to enhance an adult criminal offense under section 667, subdivision (a). (*People v. West* (1984) 154 Cal.App.3d 100, 110 [“defendant’s prior juvenile adjudications were not ‘prior conviction[s]’ within the meaning of Penal Code section 667, subdivision (a)”], cited with approval in *People v. Garcia* (1999) 21 Cal.4th 1, 24; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10 [“although the Legislature (and the electorate) elected to treat certain juvenile adjudications as prior felonies for purposes of the Three Strikes law, juvenile adjudications cannot be considered . . . a prior serious felony conviction for purposes of the mandatory five-year enhancement in section 667, subdivision (a)”].)

Accordingly, we reverse and strike the five-year enhancement under section 667, subdivision (a)(1).

DISPOSITION

The prior serious felony conviction enhancement under section 667, subdivision (a)(1), is reversed and stricken. In all other respects, the judgment is affirmed. The clerk

of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.